

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17**

TULSA, OKLAHOMA

RAUDIN MCCORMICK, L.L.C. d/b/a
RAILCREW XPRESS¹

Employer

and

Case 17-RC-12565

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on August 5, 2008, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; whether the petition filed herein is barred by a collective-bargaining agreement; whether the petitioned for single-facility unit is appropriate, or whether a multiple-facility unit is the only appropriate unit; whether the Employer's assistant lead drivers are supervisors within the meaning of Section 2(11) of the Act; whether professional driver instructors (PDI) and professional driver coaches (PDC), who may be employed in the future, are supervisors within the meaning of Section 2(11) of the Act; and whether probationary employees are appropriately included in the unit.²

¹ The name of the Employer appears as amended at the hearing.

² Upon review of the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. Commerce facts: Raudin McCormick d/b/a Railcrew Xpress is a State of Texas limited liability corporation engaged in the business of transporting rail crews,

I. DECISION

For the reasons detailed below, I conclude the following: (1) The Petitioner is a labor organization within the meaning of Section 2(5) of the Act; (2) No collective-bargaining agreement bars processing of the instant petition; (3) The petitioned for single-facility unit is an appropriate unit; (4) The Employer has not met its burden to show that Paul Long, the assistant lead driver at the Tulsa facility, is a supervisor within the meaning of Section 2(11) of the Act; (5) The unit inclusion or exclusion of the PDI and PDC job classifications will not be determined because the positions have not been staffed, and employment terms concerning such positions are unsettled; and (6) Probationary employees have a reasonable expectation of continued employment and will be included in the unit.

Accordingly, the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining with in the meaning of Section 9(b) of the Act.

All full-time and regular part-time drivers, including yard drivers, radius drivers, road drivers and assistant lead drivers employed by the Employer from the Burlington Northern Santa Fe (BNSF) rail yard located at 1631 West 33rd Place, Tulsa, Oklahoma, but EXCLUDING all lead drivers, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act, as amended, and all other employees.³

and operates from various locations throughout the United States, including from the Burlington Northern Santa Fe (BNSF) rail yard located at 1631 West 33rd Place, Tulsa, Oklahoma. During the past calendar year, a representative period, the Employer has purchased and received goods valued in excess of \$50,000 at its Tulsa facility from points located directly outside the State of Oklahoma.

c. The labor organization involved claims to represent certain employees of the Employer.

d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ The Employer employs four yard dispatchers at the BNSF rail yard in Oklahoma City, Oklahoma. The Parties stipulated at the hearing that those Oklahoma City yard dispatchers should be excluded from any unit found appropriate. There is no evidence that the Employer employs yard dispatchers from the Tulsa rail yard, nor that it contemplates employing such dispatchers. In accordance with usual Board policy, I will not make a unit determination for yard dispatchers at the Tulsa location, despite the parties' stipulation,

There are approximately 26 drivers employed by the Employer in the unit found appropriate herein.

II. ISSUES

A. Labor Organization Status of Petitioner

The Employer refused to stipulate to the labor organization status of the Petitioner. The Petitioner asserts that it is a labor organization within the meaning of Section 2(5) of the Act.

B. Contract Bar

The Employer refused to stipulate that there was no collective-bargaining agreement covering any of the employees in the unit sought in the petition.

C. Single-Facility Versus Multiple-Facility Unit

The Petitioner seeks a unit confined to the Employer's drivers working out of the Burlington Northern Santa Fe (BNSF) rail yard in Tulsa Oklahoma. The Employer, on the other hand, asserts that the single-facility unit sought by the Petitioner is not appropriate, and that only a multiple-facility unit, which would include drivers servicing BNSF rail yards in not only in Tulsa, but in Oklahoma City, Enid, and Ardmore, Oklahoma, as well as Springfield, Missouri is appropriate.

D. Assistant Lead Driver's 2(11) Status

Contrary to the Petitioner, the Employer contends that Paul Long, the Assistant Lead Driver in Tulsa, is a supervisor as defined in Section 2(11) of the Act.

where the Employer does not employ employees in the classification, and where there is no evidence that the Employer contemplates such hiring. *Trans World Airlines, Inc.*, 211 NLRB 733, 734 (1974); *Del-Mont Construction Co.*, 150 NLRB 85, 87 (1964), *Waldorf Instrument Co.*, 122 NLRB 803, 808 (1958); *Sigman Food Stores #27*, 113 NLRB 689, 692-693 (1955). The Employer also provided evidence that it employs multiple purpose vehicle (MVP) drivers at some of its facilities, but not in Tulsa. There was no evidence that the Employer contemplates using MVP drivers in Tulsa. For the same reasons outlined above for yard dispatchers, I will not make a unit determination for MVP drivers in the instant unit.

E. Eligibility of Trainers

The Employer contends that it is implementing a new training program that will establish two new job classifications; professional driver instructor (PDI) and professional driver coach (PDC). The Employer claims that these two new classifications will be supervisory and managerial in function, and as such, should be excluded from the unit found appropriate. The Petitioner seeks the inclusion of PDIs and PDCs asserting that the classifications will operate essentially as drivers.

F. Probationary Employees

Finally, the parties differ as to the eligibility of probationary employees in the unit found appropriate. The Employer believes that the probationary employees should be excluded because they do not have a reasonable expectation of continued employment, while the Petitioner argues that the probationary employees should be included because the probationary period is merely a progression to becoming a fully functional driver and because the probationary employees share the same skills, work rules, and supervision as other employees.

III. STATEMENT OF FACTS

A. Overview of Operations

The Employer is a Texas Limited Liability Corporation owned and operated by Railcrew Xpress and is engaged in the transportation of rail road crews from its various locations in Oklahoma, Texas, Arkansas, Alabama, Tennessee, and Louisiana. Railcrew Xpress also owns and operates other rail crew transportation businesses, including JLS, LLC (herein JLS), and Brown's Crew Car of Wyoming, LLC d/b/a Railcrew Xpress.

The Employer services two customers from its various locations – Burlington Northern Santa Fe and Union Pacific. The Employer operates out of five locations in Oklahoma, including the disputed locations in Tulsa, Oklahoma City, Ardmore, Enid, as well as out of the rail yard in Waynoka. JLS operates rail crew services in the States of Kansas and Missouri, including at the disputed facility in Springfield, Missouri. Employees at the Tulsa facility and the four disputed locations all provide services for BNSF.

B. Supervisory Hierarchy

The Employer's supervisory hierarchy is headed by Scott Boyes, President; John Bickerstaff, Vice President; Susan Eitzen, Assistant Vice-President/Southern Region; and Bobby Motz, Assistant Vice-President/Northern Region. The Southern Region managed by Susan Eitzen contains the Tulsa facility and the four contested locations. Reporting to Eitzen in the Southern Region are several division managers including Chris Arganbright (Missouri, Kansas, Oklahoma, and Lamar, Colorado); Raudin Cothran (Western Texas); Sean Johnson (Fort Worth, Texas area); and Bill Dunfee (Arkansas, Louisiana, and Texarkana, Texas).

Chris Arganbright is the division manager assigned to the disputed locations – Tulsa, Oklahoma City, Enid, Ardmore, Oklahoma and Springfield, Missouri. In turn, Arganbright has three area managers who report to him including Debi Hoyt, who covers the locations in Oklahoma City, Tulsa, Enid, Ardmore and Waynoka from her office in the BNSF rail yard in Oklahoma City, Oklahoma. The area manager position for the Missouri facilities, operated by JLS, which covers Springfield, St. Louis, Beardstown, West Quincy, Centralia, Blythville and Thayer, is currently vacant. JLS Area Manager

Mel Torez is responsible for the facilities in Fort Scott, Topeka, Emporia, Newton, Ark City, Wellington, Garden City, and Dodge City, Kansas, as well as the facility in Lamar, Colorado.

Finally, the lead drivers who report to Hoyt for the Oklahoma facilities are Troy Litteral, Sr. (Enid); Phillip, whose last name is unknown (Oklahoma City); Mike Lester (Tulsa); Margie Wellsey (Ardmore); and Jean Pamplin (Waynoka). There is a lead driver in Springfield, Missouri, but witness Assistant Vice President Eitzen could not recall his name.

The parties stipulated that the area managers and lead drivers are supervisors as defined in Section 2(11) of the Act. Based on the parties stipulation that the area managers and lead drivers have the authority to hire, fire, transfer, suspend, lay off, recall, promote, assign, reward, or discipline other employees, or can effectively recommend such action, and utilizes independent judgment to perform these actions, I will exclude them from the unit found appropriate.

C. Single-Facility Versus Multiple-Facility Unit

1) Drivers' Terms and Conditions of Employment

The Employer utilizes three types of drivers to service BNSF – road drivers, radius drivers and yard drivers. All drivers share the same skills and drive single driver passenger vans, with room for 7 passengers. Road drivers, also known as long haul drivers, are on call 24 hours a day, but have no set work schedule. The road drivers are called by dispatch for a run and proceed to the rail yard to pick up their van. After running their dispatched run, the road driver drops the van at the rail yard and proceeds home. Road drivers are generally dispatched to transport a rail crew from either the road

driver's home rail yard or a siding in their home rail yard's area, to another of the Employer's terminals. Road drivers are paid by the mile, with hourly wages for any wait time. The Employer employs road drivers at the Tulsa facility and the four disputed locations.

Radius drivers work a schedule and are assigned to pick up rail crews on rail sidings within 60 miles of their home rail yard and take them back to the rail yard. Radius drivers also pick up rail crews at their home rail yard and take them to sidings located within 60 miles of the rail yard. Radius drivers are hourly paid. Radius drivers are only employed at three of the five disputed locations – Tulsa, Ardmore, and Springfield.

Yard drivers also are scheduled employees and are paid hourly. A yard driver's job is to transport rail crews around the rail yard itself, from the area the rail crew appears for work to the track where their train is located and vice versa. The Employer employs yard drivers at its Tulsa, Oklahoma City, Ardmore, and Springfield facilities. There are no yard drivers employed in the Enid facility.

All road and radius drivers working from the disputed locations are centrally dispatched by five dispatchers located in Lenexa, Kansas, using the Employer's computerized dispatch system. Yard drivers are separately dispatched. The yard drivers in Oklahoma City are dispatched by the Employer's four yard dispatchers at that facility. The yard drivers at the Tulsa, Enid, Ardmore, and Springfield locations are dispatched by the train master, who is not an employee of the Employer, or of JLS.

The disputed locations are located significant distances from each other. The Tulsa location is located 202 miles from the Ardmore location, a driving distance of 3

hours. The Tulsa location is 182 miles from the Springfield, Missouri location, a 2 hour and 45 minute drive. The Enid rail yard is 116 miles from the Tulsa rail yard, which takes about 1 hour and 45 minutes to drive. Finally, the Tulsa location is 106 miles from the Oklahoma City location, again, a drive of 1 hour and 45 minutes.

The drivers at the disputed locations are subject to the same employee handbook and policies, and their electronic personnel files are maintained at the Employer's corporate headquarters in Toronto, Canada. However, employees at each of the facilities are paid different wages based on the negotiated agreements between the Employer, or JLS, and BNSF covering the varying facilities. Further, at the Springfield location, employees are employed not by the Employer, but by JLS, and as such, are paid by a different corporate entity than the employees of the Employer at the Oklahoma locations. Witness Susan Eitzen testified that it is difficult to handle pay issues when employees of the Employer perform any work for JLS at the Springfield facility. Employees at each of the facilities receive separately determined bonuses based on the time percentages and accident records calculated for each facility. While there is evidence that the Employer maintains an overall seniority list, there is no evidence that the seniority list is used in any way to effect employees' working conditions.

2) Driver Supervision

The day-to-day supervision of employees is handled by the lead driver at each separate facility. The lead drivers handle scheduling of the drivers, and are responsible for monitoring drivers' hours to assure that the drivers have sufficient hours under Department of Transportation rules to take a run. Lead drivers also handle the day-to-day minor discipline required at each location, and are fully involved in the administration of

more significant discipline with their area manager. While leads do not make ultimate hiring or firing decisions, they are called upon by the area manager to make recommendations and their recommendations are followed. The lead drivers also deal with drivers regarding such work issues as approving time off, making assignments to cover shifts, vehicle maintenance, driver safety inspections, and vehicle washing.

3) Driver Interchange

The evidence shows that approximately 375 runs were handled by the Employer from the Tulsa location in July 2008. Of those 375 runs, approximately 10 were handled by drivers from the other disputed facilities including: Oklahoma City (4), Enid (2), and Ardmore (4). The Springfield facility handled no Tulsa runs in July, and dispatch did not request that Springfield drivers cover Tulsa runs during this period. In addition to these 10 runs, additional Tulsa runs were handled by drivers from other JLS facilities during July, including Garden City, Kansas (2 – 378 miles from Tulsa, driving time 6 hours); Fort Scott, Kansas (2 runs); Wellington, Kansas (2 runs); and Muskogee, Oklahoma (1 run). No party seeks inclusion of any drivers from these locations in the unit.

Employer's witness Eitzen testified that drivers are allowed to transfer from facility to facility for their convenience, as well as when facilities are closed, or when drivers are borrowed-out to other facilities to cover short term absences. While there was general testimony that there may be as many as 5 or 6 permanent transfers a year, the only specific evidence presented of a permanent transfer at any of the disputed locations was that of assistant lead driver Paul Long, who transferred from the Ardmore location to the Tulsa location. There was also specific evidence that due to the flooding in Missouri

during the summer of 2008, employees from the Springfield facility were temporarily transferred to the Enid facility for a period of three weeks.

D. Assistant Lead Driver's 2(11) Status

Paul Long is the assistant lead driver at the Tulsa location. At the time of the hearing, Long had been in his position for approximately three weeks. None of the other disputed locations employ an assistant lead driver. In addition to his lead duties, Long is a radius driver. While there is evidence that when supervisory lead driver Lester is not available, Long can perform the same functions as Lester, Long's main job is to assist Lester with maintenance and washing of the vans. There is no evidence the assistant lead driver assists Lester with making work schedules, granting time off, or disciplining employees. Further, there is no evidence that Long has assisted with any hiring or firing decisions.

E. Eligibility of Trainers

Employer witness Eitzen testified that the Employer is in the process of instituting a new training program for employees at the disputed locations. The evidence shows that current training is non-standardized and is handled by more seasoned drivers at each facility. Most of the current training involves a new driver driving runs with another driver.

There was much testimony that the Employer has determined that it would like to increase the amount of training a driver receives, as well as formalize and standardize the training. In an effort to do this, in about April 2008, the Employer began planning a new training program and implemented portions of that new training program at its Texas locations. The new training program has yet to be implemented at any of its facilities,

including Texas. Further, the Employer plans to use two new classifications of employees in its new training program. These two new classifications are the professional driver instructor (PDI) and the professional driver coach (PDC). The PDIs will handle the classroom training for the Employer, while the PDCs will provide the on-the-job driving training. While the details are still in flux, the Employer plans to employ PDIs at only one facility, and the PDIs will either travel to the various facilities to conduct the classroom training, or the trainees will travel to the facility where the PDI is located. This detail has yet to be decided by the Employer. The Employer plans to also employ PDCs at each of its facilities, and may have PDCs for each of the driver classifications – yard, radius and road. Further, the Employer is considering separate PDCs for day and night shifts, since those driving experiences are significantly different.

The Employer anticipates that the PDIs and PDCs will be drawn from the driver pool and will be paid an additional amount while performing their training duties. How many positions, the persons who will fill these positions, and the amount of extra pay these driver trainers will receive has yet to be determined.

The Employer asserts that the PDIs and PDCs will have access to employees' timesheets, testing results, and disability information in order to properly conduct training. Additionally, the Employer testified that it anticipates that a PDI or PDC may recommend that an employee be terminated based upon the employee's training progression. Assistant Vice-President Eitzen testified that the Employer would probably take the recommendation of the PDIs and PDCs because of liability considerations.

Eitzen testified that the Employer plans on instituting the positions of PDI and PDC within the next 30 to 60 days.

F. Labor Organization Status of Petitioner

Witness Tony Bennett, employee of the Petitioner's District Lodge 171, testified that the Petitioner is an organization subject to a constitution, which among other things calls for election of officers. Bennett testified that the Petitioner's purpose is to represent employees of employers with respect to their hours, wages and other terms and conditions of employment. Bennett further testified that employees are members of the organization and participate in the organization by attending meetings and voting in internal elections, including elections for officers.

G. Contract Bar

The Employer's witness, Assistant Vice-President Susan Eitzen, testified that no labor organization currently represents any of the employees at the disputed locations, and there is no collective bargaining agreement which covers any of the employees in question.

H. Probationary Employees

Drivers are subject to a 90-day probationary period when they are first hired, which can be extended for an additional 30 to 60 days if needed. Probationary drivers are subject to the same Employer handbook and policies as non-probationary drivers. Probationary drivers are paid slightly lower wages than other drivers and receive no benefits until the conclusion of their probationary period. Probationary drivers work in the same job classifications, have the same supervision and attend the same drivers' meetings as regular drivers. While it is possible that a probationary employee might be terminated for lesser cause than a non-probationary employee, the Employer still assesses the severity of the infraction in determining probationary employees' discipline, and

applies the same progressive discipline it would afford a non-probationary employee. Approximately 50 percent of probationary employees become regular employees. Many employees do not continue working through their probationary period because they do not like the work and voluntarily quit.

III. ANALYSIS

A. Labor Organization Status of Petitioner

Section 2(5) of the Act provides the following definition of “labor organization”:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Under Section 2(5) of the Act, only three simple requirements have to be met to establish labor organization status. First, the entity in question must be an organization or group of any kind. Second, employees must participate in the organization. And third, the organization must exist, at least in part, to deal with employers concerning such matters as wages, hours, or working conditions. These requirements are interpreted liberally.

NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959).

The record establishes that the Petitioner meets the statutory definition of “labor organization”. The Petitioner is an organization governed by a constitution. The purposes of the Petitioner are consistent with Section 2(5) of the Act, and include negotiating with employers on behalf of employees concerning those employees’ hours, wages and other terms and conditions of work. In addition, employees participate in Petitioner’s organization by attending meetings and voting in internal union elections. Based on the foregoing, I find that the Petitioner is an organization that exists for the purpose of representing employees in dealings with their employers regarding terms and

conditions of employment and that employees participate in the functioning of the Petitioner. Accordingly, I conclude that the Petitioner is a labor organization as defined in section 2(5) of the Act.

B. Contract Bar

There was no evidence produced to support that there are any collective-bargaining agreements covering any of the employees in the unit sought by the Petitioner, or in the unit urged by the Employer. In fact, the only evidence produced on this issue was by the Employer's witness Eitzen, who testified that there is no union that represents the employees at any of the locations in issue, and there is no collective-bargaining agreement at any of the disputed locations. As such, despite the Employer's unwillingness to stipulate, its own evidence establishes that there is no contract bar to this proceeding.

C. Single-Facility Versus Multiple-Facility Unit

It is well established that, when considering a multiple-facility operation, a single facility unit is presumptively appropriate for collective bargaining. *Bowie Hall Trucking*, 290 NLRB, 41, 42 (1988), citing *Sol's*, 272 NLRB 621 (1983). This presumption may be rebutted by a showing of functional integration so substantial as to negate the separate identity of the single facility unit. *J&L Plate*, 310 NLRB 429 (1993); *Globe Furniture Rentals*, 298 NLRB 288 (1990); *Dixie Belle Mills*, 139 NLRB 629, 631 (1962). In deciding whether the presumption has been rebutted, the Board considers such factors as the centralized control over daily operations and labor relations; employees' skills, job functions, wages, benefits and working conditions; common supervision of employees and facilities; employee contact and interchange; and the geographic proximity of the

facilities. *Bowie Hall Trucking*, supra at 42. The presumption is in favor of petitioned-for single facility units, and the burden is on the party opposing that unit to present evidence overcoming the presumption. See, *Red Lobster*, 300 NLRB 903, 910-911 (1990); *Esco Corp.*, 298 NLRB 837, 839 (1990).

While the evidence supports that the Employer's administrative and personnel functions are centralized, and that the ultimate responsibility for hire, discharge, and high level discipline rests with the area managers, there is compelling evidence of significant separate supervision of each facility through the lead drivers, whom the parties stipulated are supervisors within the meaning of Section 2(11) of the Act. It is the lead driver who makes decisions involving matters which make up daily work lives of the employees and who handles the day-to-day supervision of the facility. Lead drivers participate in the hiring process, issue low level discipline and are involved in and recommend more severe discipline to the area managers, recommendations which are routinely followed by the area managers. The lead drivers are also responsible for compliance with the Employer's rules and regulations. The fact that Hoyt as the area manager is also involved in these decisions does not negate the significant impact that driver leads have on the day-to-day affairs at their facilities. *Penn Color*, 249 NLRB 1117, 1119 (1980); *Renzetti's Market*, 238 NLRB 174, 176 (1978).

Additionally, as to the Springfield facility, the evidence of separate day-to-day supervision is even more compelling. The Springfield drivers not only have separate day-to-day supervision through their lead, but are governed by a different area manager.

While the Employer's evidence establishes some functional and administrative integration among its various facilities, the evidence does not establish such integration to

overcome the differences between the facilities, including the different wages paid to the drivers at each of the facilities based on separate contracts with BNSF, as well as the fact that Springfield drivers are not even paid by the same corporate entity. Additionally, employees at each facility receive different bonuses, which are based on each facility's on-time and accident numbers. Finally, the evidence shows that the drivers receive different training at each location, something which the Employer is seeking to change, but which has not changed as of this time.

The geographical distance between the Employer's facilities further militates against a finding that a multiple-facility unit is the only appropriate unit. The Employer's evidence establishes that the distance between Tulsa and the facilities it seeks to include begins at 106 miles for the Oklahoma City location and is as high as 202 miles for the Ardmore location. While geographical proximity is not the controlling factor, its importance is increased when other factors, such as separate supervision and different wages also suggest the appropriateness of a single location unit. *Bowie Hall Trucking*, supra at 43.

While recognizing that employee interchange is an important factor in determining community of interest in a multiple-facility determination, I find that the evidence presented on employee interchange does not negate the remainder of factors that support upholding the single-facility presumption. I find that the fact that Tulsa employees' normal dispatch may include as a stop or final destination at another of the Employer's terminal is not evidence of employee interchange, or evidence of temporary transfer of work. As witness and Tulsa driver Richard Brown testified, it is the job of a road driver to transport rail crew from one of the Employer's facilities to another of the

Employer's facilities. As such, Brown testified that since it was the regular job of a road driver, he was frequently dispatched to take a rail crew from Tulsa to another of the Employer's facilities, including Enid, Oklahoma City, Ardmore and Springfield, as well as other surrounding terminals. It is not unusual in the transportation industry, where an employer has various terminals, that an employee would be dispatched to another of the Employer's terminals, either as a stopover, or as a final destination, and such is not evidence of employee interchange.

Neither is evidence that employees have transferred from facility to facility when facilities are closed in consolidation moves, or due to this summer's flooding compelling evidence of employee interchange. Employee interchange either created by the opening or closing of an establishment, or done for the convenience of employees is not entitled to much weight in determining the scope of the appropriate unit. *Renzetti's Market, Inc.*, supra at 176 fn.8.

Finally, as to the number of runs handled during July by drivers from Enid, Ardmore, Oklahoma City, and Springfield, as evidence of interchange, I find such evidence insufficient to negate the separate identity of the Tulsa location. The Employer's exhibits show that just a little over 2 percent of the Tulsa runs are handled by the other locations sought to be included in the unit by the Employer, and that in fact, no runs were handled out of the Springfield facility, which the Employer also seeks to include in the unit. Additionally, the records show that nearly as many runs were handled by JLS facilities in Kansas that no party seeks to include in the appropriate unit. On balance, I do not find the amount or frequency of the work interchanged to be significant

or substantial when compared to the number of runs performed by the Employer's Tulsa drivers.

In conclusion, I find that the petitioned-for single facility bargaining unit consisting of the Employer's operations in Tulsa is appropriate. I note in particular that the Tulsa facility and the other facilities the Employer seeks to include in a single bargaining unit have separate first line supervision; separate wages and bonuses; are separated by significant geographic distances; and are not so functionally integrated so that employees at the Tulsa facility have lost their separate identity.

For the reasons outlined above, I conclude that the Employer has failed to rebut the presumptive appropriateness of the single-facility unit, and that the exclusion of the Oklahoma City, Enid, Ardmore, Oklahoma and Springfield, Missouri locations does not render the petitioned-for unit inappropriate, especially where the presumptively appropriate unit guarantees employees the greatest freedom in exercising the rights guaranteed under the Act. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 139 (1969). *Manor Healthcare Corp.*, 285 NLRB 224 (1987).

D. Assistant Lead Driver's 2(11) Status

Pursuant to Section 2(3) of the Act, "any individual employed as a supervisor" is specifically excluded from the term "employee." Section 2(11) of the Act defines the term "supervisor" to include any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. Possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an employee, provided that

authority is exercised with independent judgment on behalf of management and not in a routine manner. See, e.g., *Airline Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Browne of Houston*, 280 NLRB 1222, 1223 (1986). The term “independent judgment” applies regardless of the supervisory function implicated. See *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 7 (2006).

The Board construes supervisory status narrowly “because the employee who is deemed a supervisor is denied the rights which the Act is intended to protect.” *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995). It is therefore incumbent upon the party asserting that a group of individuals are statutory supervisors to demonstrate their supervisory status, and any lack of evidence is construed against the moving party. See *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866, 167 LRRM 2164 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 535 fn. 8 (1999).

I find that the Employer has failed to establish that the assistant lead driver Paul Long is a supervisor within the meaning of Section 2(11). While Susan Eitzen testified that Long possesses all of the authority that lead driver Mike Lester exercises at the Tulsa facility, by filling in when Lester is not available, the specific evidence presented at the hearing does not support a finding of supervisory status. The evidence establishes that stipulated supervisor Lester prepares the schedules for employees, makes sure drivers have the hours available for driving, issues discipline, grants time off and assists Area Manager Debi Hoyt with hiring and firing decisions. Long’s principle duty, aside from his regular duties as a radius driver, is to assist Lester in maintaining and washing the vans. The specific evidence shows that Long does not have the authority to grant time off, and instead, that responsibility is left to Lester or Hoyt. Additionally, Long does not

prepare the employees' schedules as Lester does, nor does he have the same authority to discipline employees. Based on these factors, I do not find that Long has the requisite authority to exclude him from the unit, and as such, he will be included in the unit.

E. Eligibility of Trainers

I decline to decide whether to include or exclude PDIs and PDCs from the unit sought by the Petitioner. While there may eventually be classifications of PDI and PDC, no individual is currently employed in this job classification and it is speculative at this time to attempt to determine this issue.

F. Probationary Employees

Probationary employees are included in the unit where their general conditions of work and their employment interests are like those of regular employees and they have a reasonable expectation of continued employment. *Johnson's Auto Spring Service*, 221 NLRB 809 (1975); *Rust Engineering Co.*, 195 NLRB 815, 816 (1972); and cases cited. The evidence in the instant case shows that probationary employees perform the same work, in the same job classifications, in accord with the same Employer rules and policies, and under the same supervision as non-probationary employees. Probationary employees such as these hold their jobs with the idea of permanent employment after completion of their probationary period.

The Employer argues that the fact that only 50 percent of the probationary employees complete their probationary period warrants a finding that they should be ineligible to vote in the election, as it shows that there is no reasonable expectation of continued employment. I do not accept the Employer's contention. Probationary employees' eligibility does not turn on the proportion of such employees who leave the

Employer's employ throughout the probationary period, whether willingly or unwillingly. See, *Hollaender Mfg. Co.*, 299 NLRB 466, 469 (1990); citing, *National Torch*, 107 NLRB 1271, 1273 (1964) (Only 20 percent of probationary employees completed their probation), *Johnson's Auto Spring*, supra at 809 (Only 1 of 13 probationary employees completed their probation); and *Extral Corp.*, 111 NLRB 878, 880 (1955) (Less than 50 percent of probationary employees continued employment beyond their 90-day probation.). Consequently, probationary employees are included in the unit.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated

before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO.

V. ELECTION NOTICES

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that two

copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director for Region 17 within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make this list available to all parties to the election.

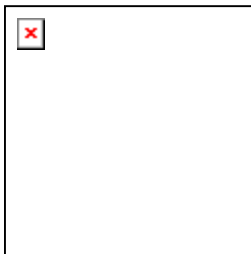
In order to be timely filed, such list must be received in the Regional Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before **August 25, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall by department, etc.) If you have questions, please contact the Regional Office.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m. (ET) on **September 2, 2008**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the E-Gov tab and click E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file documents electronically will be displayed. The request for review may not be filed by facsimile.

SIGNED at Overland Park, Kansas, this 18th day of August 2008.



/s/ Daniel L. Hubbel

Daniel L. Hubbel, Regional Director
National labor Relations Board
Region 17
8600 Farley, Suite 100
Overland Park, Kansas 66212